

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

EIGHT MILE STYLE, LLC; MARTIN
AFFILIATED, LLC

Plaintiffs,

v.

SPOTIFY USA, INC.

Defendant.

Civil Action No. 3:19-cv-00736
Judge Aleta A. Trauger

**ACKNOWLEDGMENT BY THE UNITED STATES OF AMERICA
OF PLAINTIFFS' CONSTITUTIONAL CHALLENGE**

On August 23, 2019, Plaintiffs Eight Mile Style, LLC and Martin Affiliated, LLC filed a notice of constitutional challenge with respect to the Orrin G. Hatch-Bob Goodlatte Music Modernization Act (H.R. 1551, Pub. L. 115-264) (the “MMA”), which amended certain provisions of 17 U.S.C. § 115. *See* Pl.’s Notice of Filing (D.E. 8); Complaint (D.E. 1 at ¶¶ 8-13) (describing amendment). Although the United States may intervene in any action wherein the constitutionality of an act of Congress is questioned, 28 U.S.C. § 2403, here the constitutional challenge has only been raised in the Complaint. Compl. at ¶¶ 8-14. Defendant has not yet answered. The United States is unaware of any motion or other filing that details the basis of Plaintiff’s constitutional challenge or seeks a Court ruling striking down the identified provisions of the Act.

Given that the case is in its early stages, there is the possibility that this case may be resolved without the Court having to decide the constitutional challenge asserted by Plaintiffs. Indeed, Plaintiffs suggest that their constitutional challenge may never arise in this litigation. The constitutional challenge relates to the MMA’s transitional provision limiting damages to a royalty (rather than lost profits, statutory damages and/or fees) for qualifying “digital music providers” who infringed musical works on or before December 31, 2017, but are sued after that date. *See* Compl. at ¶¶ 8-14; Pub. L. 115-264, § 102(a)(4) (amending 17 U.S.C. § 115 to incorporate new subsection (d)(10)).

According to Plaintiffs, Defendant does not qualify for the limitation on damages because it has not complied with the MMA’s requirements for obtaining the limitation on liability. Compl. at ¶¶ 8-14. Therefore, the United States submits that intervention would be premature at this time. *See Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981) (“[P]rior to reaching any constitutional question, federal courts must consider non-constitutional grounds for decision.”); *Hagans v. Levine*, 415 U.S. 528, 543 (1974) (non-constitutional issue “was to be decided first and the [constitutional issue] not reached if the statutory claim was dispositive”).

The Solicitor General decides whether to approve intervention by the United States, 28 C.F.R. § 0.21, and obtaining the Solicitor General’s approval generally takes several weeks.

Therefore, if either party seeks a ruling by the Court as to the constitutionality of 17 U.S.C. § 115 in a written motion or other paper, the United States requests that the Court order the party

filing such a motion or other paper to notify the United States in the manner prescribed in Fed. R. Civ. P. 5.1 and 28 U.S.C. § 2403 promptly upon filing. And, the United States requests that the Court permit the United States to intervene within 60 days of such notice.

Respectfully submitted,

JODY H. HUNT
Assistant Attorney General

DONALD Q. COCHRAN
United States Attorney
Middle District of Tennessee

By: s/ Mark H. Wildasin
MARK H. WILDASIN (BPR 015082)
Assistant United States Attorney
110 9th Avenue South, Suite A-961
Nashville, TN 37203-3870
Telephone: (615) 736-5151
Fax: (615) 401-6626
Email: MWildasin@usa.doj.gov

GARY L. HAUSKEN
Director
United States Department of Justice
Civil Division
Commercial Litigation Branch
Washington, D.C. 20530
Telephone: (202) 307-0342
Fax: (202) 307-0345
Email: ghausken@civ.usdoj.gov

Attorneys for the United States of America

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Acknowledgment has been served via the Court's electronic filing system, on October 16, 2019, upon:

<p>James Franklin Blumstein Vanderbilt Legal Clinic Vanderbilt Law School 131 21st Avenue South Nashville, TN 37203 Email: james.blumstein@vanderbilt.edu <i>Attorney for Plaintiffs</i></p>	<p>Richard S. Busch King & Ballow 315 Union Street Suite 1100 Nashville, TN 37201 Email: rbusch@kingballow.com <i>Attorney for Plaintiffs</i></p>
<p>Aubrey B. Harwell , III Marie T. Scott Neal & Harwell, PLC 1201 Demonbreun Street Suite 1000 Nashville, TN 37203 Email: tharwell@nealharwell.com Email: mscott@nealharwell.com <i>Attorneys for Defendant</i></p>	

s/ Mark H. Wildasin
MARK H. WILDASIN
Assistant United States Attorney